



REPUBLIC OF KENYA



In re Estate of Murgong Arap Kimenja alias Kimurgong Arap Menjo (Deceased) (Probate & Administration 03 of 2021) [2024] KEHC 5899 (KLR) (22 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5899 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
PROBATE & ADMINISTRATION 03 OF 2021**

JR KARANJA, J

MAY 22, 2024

**IN THE MATTER OF THE ESTATE OF THE LATE MURGONG
ARAP KIMENJA ALIAS KIMURGONG ARAP MENJO (DECEASED)**

RULING

1. The application vide the summons for confirmation of grant dated 13th July 2022 is for confirmation of the grant of letters of administration made to the Petitioner, Emily Jelimo Menjo and is grounded on facts that the objection to the making of grant was raised but dismissed by the court and that there is no provision of dependants pending and no estate duty is payable.
2. The supporting grounds are further supported by the Petitioner's averments contained in the supporting affidavits deponed by herself on 13th July 2022.
Paragraph five (5) of the supporting affidavit contains the proposed mode of distribution of the estate comprising of Land Parcels No. Nandi/ Baraton/56, 54 and Nandi/Baraton/1 as well as Nandi/ Kombe/377.
But paragraph six (6) alludes to the estate being sold and the proceeds being shared among the beneficiaries.
3. However, a protest to confirmation of the grant in the manner proposed was raised by Elizabeth Jepkoech, vide her affidavit of protest dated 22nd November 2022 in which she avers that she was one of the wives of the deceased, the late Murgong C/o Arap Kimenjo also known as Kimurgong Arap Menjo, who allegedly paid dowry for her in the year 1979 in a traditional engagement ceremony known as "koito" and thereafter went to stay with her together with his first wife.
4. Elizabeth (Objector), also averred that the deceased provided for her and her children upto the time of his death and that she stayed in his land for a period of forty three (43) years and that is where the deceased, his first wife, the Objector's son and grandson are buried. She has for all those years known the land as her home.
5. The Objector averred that it came as a shock for her to learn sometime in the years 2016/2017 that succession proceedings had been convened respecting the estate of the deceased. She then filed an



objection and later learnt that the court file went missing in the court registry only to re-surface later under a new file number. She also learnt from her advocate that her objection had been scheduled for hearing on 29th June, 2022.

6. The Objector averred further that she did not attend court on 27th June 2022 as she had not been notified by her advocate to do so. Her objection was thus dismissed in a draconian manner without being heard on merit. She contends that the present summons for confirmation of grant is skewed in favour of the Petitioner and that she has been locked out. That, the summons is biased and discriminatory for failure to provide for the deceased's fourth house.
7. The Petitioner, in response to the protest filed a replying affidavit dated 2nd December 2022, mainly addressing the failure of the objector to attend court on 27th June 2022 for her objection proceedings which were thus dismissed.

The Petitioner contends that the objection proceedings were an abuse of the court process by the objector and that the issues raised in the objection are repeated in the present protest.

8. Prior to the response aforementioned, the Objector filed on application vide the summons dated 28th November 2022 for review, variation and/ or setting aside of the orders made by the court on 27th June 2022 and reinstating the objection to making grant dated 13th March 2017. This was done despite the existence of the Objector's protest affidavit dated 22nd November 2022 and filed on 29th November 2022.
9. Nonetheless, the protest having been heard, the summons for review of the said court order was rendered useless and obsolete and is hereby struck out and dismissed for being an abuse of the court process.

Be that as it may, further to the affidavit evidence provided herein by both parties oral evidence was also received pursuant to the court's direction on 17th April 2023 to the effect that the protest be heard by oral or "viva-voce" evidence with either party being at liberty to call a total of four (4) witnesses each.

10. In that regard, the objector Elizabeth Jepkoech (PW1), testified as the Plaintiff and called three (3) witnesses including Felister or Philister Somoei (PW2). Richard Koskei (PW3) and Henry Kipkemboi Lagat (PW4)

The Petitioner, Emily Jelimo Menjo (DW1), testified as the Defendant and called two witnesses including (Christine Tuwei (DW2) and William Kiptoo (PW3).

11. The evidence in all its forms i.e. affidavit, oral and witness statements was dully considered by this court in the light of the court record and rival submissions presented in writing by both the Objector and Petitioner through their respective learned counsels, Mr. Tarigo and Mr. Lagat.

It became apparent to this court that the bone of contention was not whether the Objector was a Dependant and/or beneficiary of the deceased's estate but whether she was such dependant/beneficiary as a wife of the deceased or rather, fourth (4th) wife of the deceased, hence the surviving widow of the deceased's alleged fourth (4th) house.

12. However, from the court record a preliminary issue emerges i.e. whether the impugned grant was lawfully valid and by extension, whether the present application is proper and competent before the court.

Indeed, the present summons for confirmation of grant arises from the impugned grant issued to the Petitioner on 13th February 2017 by the magistrate's court at Kapsabet respecting the estate of the late Murgong S/o A. Kimenjo, also known as Kimurgong Arap Menjo (deceased).



The necessary petition was made on 7th June 2016 on the basis of the chief's letter dated 6th June 2016, which showed that the deceased was resident of Chemundu location, Baraton Sub-Location within Nandi County and that he was married to three (3) women in his lifetime.

13. The deceased's three wives included the Petitioner herein who is the only surviving widow of the deceased her first and second co-wives having preceded her in death.

In the petition, the persons listed as the proposed sureties were Titus Kipkogei Kemboi and Eliud Kibiwot Menjo.

But, in a strange twist of events, the two sureties were considered and held out as the Petitioners/ Applicants in the relevant Gazette Notice No. 9096 of 28th October 2016. This was a glaring error for which neither the actual Petitioner nor the proposed sureties deemed fit to correct thereby resulting in the issuance of the impugned grant which was in the circumstances null and void "*abinitio*", invalid and of no-effect with regard to the administration and distribution of the deceased's entire estate for want of the pre-requisite gazette publication and notice (See, Rule 26(1) [Probate and Administration Rules](#)).

14. Even if the grant was issued to the proposed sureties in terms of the gazette notice No. 9096, it would still be invalid, null and void "*abinitio*" for the simple reason that the sureties were not the actual Petitioners/ Applicants and could not under any circumstances be treated as such.

In an attempt to salvage the undesired state of affairs the Petitioner vide the summons dated 14th December 2016 invoked Section 67(1) of the [Succession Act](#) to apply for the grant to be issued in her name. Apparently, it would appear that the impugned grant was issued pursuant to that application which was inherently a misconception and went contrary to the aforementioned provision of the law.

15. The provision i.e Section 67 (1) of the [Succession Act](#) provides that: -

“No grant of representation other than a limited grant for collection and preservation of assets shall be made until there has been published notice of the application for the grant, inviting Objectors thereto to be know to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.”

Clearly, publication of the application for grant by a gazette notice is contemplated in an application under the provision aforementioned.

It would therefore follow that the impugned grant was issued in the absence of the pre-requisite publication *vide* a gazette notice which essentially acts as an invitation to any would be Objector to make known his/her objection to the making of a grant.

16. There being no objection lodged to that effect by the Petitioner, but by the Objector on the 13th March 2017, it meant that the objection was also misconceived and of no legal effect since the impugned grant had already been issued on 13th February 2017, a month earlier. In any event, there could not have been an objection to a petition which had not been published and notice issued in respect thereof. Besides, the Gazette Notice No. 9096 of 28th October 2016, was erroneous as the proposed sureties were not the actual Petitioners/Applicants of the impugned grant.

17. The factors foregoing clearly indicate that the impugned grant was not lawfully issued and cannot therefore be a basis of the present application vide the summons for confirmation of grant dated 13th July 2022, which invariably becomes fatally defective, incompetent and improper before this court.



Consequently, the impugned grant and the impugned summons for confirmation of the grant commended themselves for revocation and dismissal respectively and are hereby revoked and dismissed accordingly.

18. The foregoing finding therefore renders it imprudent and unnecessarily for this court to dwell on and make a determination on the dispute emerging from the protest which was anchored on the dismissed summons for confirmation of grant dated 13th July 2022 and must also invariably stand dismissed.

However, consideration being given to the circumstances of this case and its long history this court deems it just and fair to invoke the provisions of Rule 73 of the *Probate and Administration Rules* and order that a fresh grant be issued in the name of the Petitioner, Emily Jelimo Menjo as the only surviving widow of the deceased and two or three other persons to represent the other houses of the deceased.

19. In that regard, the parties shall nominate and provide the names of the two or three other persons for appointment as co-administrators of the entire estate of the deceased within the next four (4) months from this date hereof and for avoidance of disputes in relation to distribution of the estate it would be prudent and most important for the parties to agree on the actual and proper beneficiaries of the deceased's estate and their respective relationship with the deceased in that regard.

20. It would also be of benefit to the beneficiaries to heed to the constitutional principles enunciated in Article 2(4) of the *Constitution* of Kenya 2010, to wit: -

“Any Law, including Customary Law, that is inconsistent with the constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid.”

And, Article 45(2), which provides that: -

“Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.”

21. Under Article 45(4), parliament was to take responsibility for enactment of legislation that recognizes: -

- a. Marriages concluded under any tradition, or system of religious, personal or family law and
- b. Any system of personal and family law under any tradition; or adhered to by persons professing a particular religion to the extent that any such marriages or systems of law are consistent with this constitution.”

Indeed, the *Marriage Act* 2014, was one such legislation. It is an Act of Parliament which provides for amendment and consolidation of the various laws relating to marriage in Kenya and connected purposes.

22. Section 3(1) of the Act provides that: -

“Marriage is the voluntary union of a man and woman whether in a monogamous or polygamous union and registered in accordance with this Act.”

And, Section 6(1) of the Act provides that: -

“A marriage may be registered under this Act if it is celebrated: -

- a. In accordance with the rules of a Christian denomination;



- b. As a Civil Marriage;
 - c. In accordance with the customary rites relating to any of the communities in Kenya;
 - d. In accordance with the Hindu rites and ceremonies; and
 - e. In accordance with Islamic Law.
23. The Act also provides for marriage relationships which are prohibited. Thus Section 10(1)(a) provides that: -

“A person shall not marry:

- a. That person’s grandparent, parent, child, grandchild, sister, brother, cousin, great aunt, great uncle, aunt, uncle, niece nephew, great niece or great nephew.”

While Section 11(1)(b), provides that: -

“a union is not a marriage if at the time of the making of the union: -

- a.
- b. The parties are within the prohibited marriage relationship.”

24. Basically, the Marriage Act sets down the parameters for a valid marriage whether under statutory laws or customary laws. However, if such law is inconsistent with the constitution, it would be null and void “*ab-initio*” and so would marriage relationships falling within the purview of prohibited marriages.
25. All said, the impugned grant stands revoked. The Petitioners impugned summons for confirmation of grant stands dismissed together with the Objector’s protest in respect thereof.

Ordered accordingly.

DELIVERED AND DATED THIS 22ND DAY OF MAY, 2024

J. R. KARANJAH,

JUDGE

